included the agreement that these loan servicing agreements could be transferred free and clear under 363.

JUDGE JONES: You're saying they didn't object to the compromise?

MS. JARVIS: They didn't present evidence. They didn't preserve their rights.

JUDGE JONES: But they were objecting to the -- the plan or at least the sale in the nature of the -- through the plan, that said these aren't executory contract; there doesn't have to be some special cure. They did object to that. And you're just saying they waived their rights to appeal because they didn't object to the compromise of that issue.

MS. JARVIS: Right.

JUDGE JONES: But they didn't agree to the compromise. They were either moot -- mute not moot -- mute, in any event, or did they not agree to the compromise, so how are they waiving their right to appeal, which they actually raised at the time of confirmation?

MS. JARVIS: Well, as the -- yeah, as the court found below in the passage I read to you, she said if -- you know, that they had not properly presented any evidence to dispute the compromise or, you know, the validity or effectiveness of the compromise. No evidence was presented showing -- I mean, she made a specific --

JUDGE JONES: But, of course, there's no notice of

the compromise. That -- there wasn't a special hearing to consider the compromise. There was a hearing -- notice and hearing of the sale and the sale order, the objection, and the last minute compromise that's presented. There's no --

MS. JARVIS: Well, --

JUDGE JONES: -- in that sense, no requirement that they file a written objection to the compromise that's presented orally at the last minute.

MS. JARVIS: Well, the compromise -- you have to I think separate off the compromise that's presented orally at the last minute. That's not the compromise we're talking about here.

JUDGE JONES: Okay.

MS. JARVIS: The 363 compromise is in the plan --

JUDGE JONES: Okay.

MS. JARVIS: -- as part of the compromise. And they did not present any evidence disputing that compromise.

JUDGE JONES: Did they object to it?

MS. JARVIS: They objected to the plan but without presenting any evidence. And there was evidence --

JUDGE PRO: What evidence do you suggest have would have been viable? What should they have presented?

MS. JARVIS: Any compromise requires -- even in a plan, requires that you comply with Rule 9019. The standards of Rule 9019. Evidence was presented by the

debtors in the declaration of Mr. Allison, showing that this was an appropriate compromise under 9010. And no -- and in addition to that, there was evidence presented on the prepaid interest and why that was, you know, appropriately treated under the plan, and no evidence was presented to counter that evidence.

In addition, they didn't present any evidence showing that they would even suffer any direct pecuniary harm as a result of the transfers of the loan servicing agreements as provided for the -- under the plan and they thusly lacked standing on appeal as well.

Finally, with -- on this issue with respect to the Jones Vargas Direct Lenders, their joinder was limited as follows -- and I quote from their joinder.

"The objecting --

JUDGE JONES: Joinder in the appeal?

MS. JARVIS: Yeah. No, the joinder in The Lender Protection Groups objections. So they joined.

JUDGE JONES: Okay.

MS. JARVIS: "The objecting JV creditors also do not object to the sale of the loan packages to Compass so long as it is clear there is no assumption and assignment that would suggest that there has been a cure of the USACM defaults."

So they specifically, basically, did not adopt the

objection with respect to 363. And by their express limitation in their objection below, then they do not have standing to raise the issues under 363.

JUDGE JONES: Did the last minute compromise put into effect their limitation? That is, they say we don't object to the sale except to the extent that it purports to be a recognition that they don't have to cure. Did the last minute compromise effect the very cure that they're -- or preserve their right to demand a cure that they were insisting on?

MS. JARVIS: No, because what they're -- what they were saying actually is they didn't want an assumption and assignment that would suggest there'd been a cure. So, in other words, they were concerned about that there would be an assumption and assignment that would cure all the defaults and they wouldn't have any rights to claim, you know, whatever they could, which --

JUDGE JONES: But the order as signed does, in essence, waive that right in some respects.

MS. JARVIS: It does not cure any of the defaults in the sense that there is the right to claim --claim -- make claims against the debtor with respect to those defaults that are not cured.

JUDGE JONES: Right.

MS. JARVIS: And then there was, of course --

JUDGE JONES: But they can't make claims against the new servicer?

MS. JARVIS: No, 'cause they're sold free and clear except for the -- the compromise that no one objected to which allowed them to use matured pre-petition breaches as a basis for changing servicers, if they met the other conditions.

Let me then turn to -- in addition to lacking standard for failure to preserve rights, with respect to The Lender Protection Group appellants and the Keyo [phonetic] family members of the Jones Vargas Direct Lender appeals, these appellants were not named, as expressly required under the Federal Rules of Bankruptcy Procedure 8001(a). No members of the LPG were named at all in the notice of appeal and even the 2019 statement was not attached to the notice appeal. And the notice of appeal by the Jones Vargas Direct Lender only named -- they named some parties which were properly named, but then they named the Keyo family members which were not identified. And this is a specific requirement of 8001. It used to be a requirement of 3(c) under the Federal Rules of Appellate Procedure. And when it was a requirement the Supreme Court decided in the Torres case that if you didn't name your appellants it's as if you did not appeal. There is -- the appeal is not proper.

JUDGE PRO: Clarify for me your position on that. You extend that to the fact that if there are appellants -- I

realize you're talking about certain of them not being adequately named --

MS. JARVIS: Yeah.

JUDGE PRO: -- but if even one appellant is properly identified for purposes of 8001(a), how does that impact the dismissal of the appeal?

MS. JARVIS: You're correct it would not be a total dismissal 'cause there were certain appellants that were properly named.

JUDGE PRO: All right.

MS. JARVIS: But it would dismiss the vast majority of these appellants because none of them, you know, were properly named as required.

JUDGE JONES: And we're talking about Ms. Chubb's client?

MS. JARVIS: Some of Ms. Chubb's clients were properly named. The Lender Protection Groups were -- none -- no one was named.

JUDGE JONES: Now, in the Bankruptcy Court of course it's clear who she represents?

MS. JARVIS: In Ms. -- in her case with the Jones Vargas Direct Lenders, they did file a 2019 statement. I think people know in the Bankruptcy Court.

MR. JONES: But the defect you say is just simply that some of them are not named in the notice of appeal.

MS. JARVIS: Yes. Right. And the more -- the more --

JUDGE JONES: That's a rather technical basis for --

MS. JARVIS: Yeah, well, and the more -- the more disturbing issue or the more problematic issue is The Lender Protection Group because even though they filed 2019 statements, we can't identify who these parties are, even for the 2019 statements. They don't comply with the rules under 2019 because it requires --

JUDGE PRO: This is the one that consists of some 400 potentially --

MS. JARVIS: Well, and if you -- if you look at 'em -- I mean, if you look at this, would get to the issue of confusion. I mean, in the transcript at -- below, at the confirmation hearing, on page 263 of the transcript of December 19th, the Court asks Mr. Smith:

"And how many people are covered by your objection?

"Mr. Smith: How may people do I represent?

"The Court: Uh-huh. About.

"Mr. Smith: About 350. I've updated about 350."

Now, that updated statement was filed on December 18th, even though the objection of Lender Protection Group was filed on December 11th. That was the deadline for filing, leaving open the question of how many people actually were included in the December 11th objection.

Now, in the motion and response that was filed in this court, Mr. Smith says he represents approximately 400 investors. This is -- I mean, even if you take the more lenient standard under Rule 3(c), as it's been amended, there is clear confusion about who he represents and it's -- you know, just watching this transition of events, you know, it's -- that no one could objectively figure out who are the parties that he represents.

JUDGE JONES: Now, you've cited a Supreme Court case that says when the general appellate rule containing this requirement that an appeal must be dismissed if it's not followed, but does that case, without having that case here in front of us, factually, does that case involve an appellant who filed simply no names on the notice or does it, like this case, involve a notice of appeal that does designate some of the people that clearly counsel was representing in the Bankruptcy Court but not others that the same counsel was representing?

MS. JARVIS: Well, let me go back and kind of look at the Ninth Circuit -- what they've done with this, because there's been a change in Rule 3 and how that affects Rule 8001(c).

Rule 3 originally had -- you know, you had to name the parties. And after the Torres case it was changed so that under Rule 3 you can now -- the attorney can now --

representing -- it says:

"But an attorney representing more than one party may describe those parties with such terms as all parties, the defendants, the plaintiffs, A, B, et cetera, all defendants except X.

So Rule 3(a) was specifically amended to allow, you know, kind of these group statements.

However, Rule 8001(c) was not so amended. 8001(c) has the stricter standard with respect to -- to names. Rule 8001(c) requires that a notice of appeal shall contain the names of all parties to the judgment, order or decree appealed from and the names, addresses and telephone numbers of their respective attorneys. So the standard is more strict on that issue under 8001.

The Ninth Circuit has actually acknowledged in the Cascade case that there is a difference between the standard under Rule 8001(c) and Rule 3 -- 8001(a) and Rule 3(c). In fact there is reason why this wasn't changed because in a normal case you have two sides -- I mean you might have some, you know, third party defendant, et cetera, but it's -- it's pretty defined. In a bankruptcy case and in this bankruptcy case, in particular, we have thousands of interested parties. And, therefore, not changing the rules for bankruptcy appeals, you know, is understandable, given that we need the ability to understand exactly who is appealing from this order, what

rights, what claims they have, what standing they have and therefore the rule is stricter.

And in fact in the -- I think it's the Dudley case, which we cite out of the Ninth Circuit, it's a 2001 case, it specifically says, again, that 8001 is different than 3(c) and that it requires the -- them to contain the names of all parties to the judgment and citing back again to the Torres and the stricter standard.

JUDGE PRO: Just let me make sure I understand. If this were the only issue in front of us, even if we accepted everything you say, there would still be a pending appeal at least as to certain parties.

MS. JARVIS: Right. Only to certain parties.

JUDGE PRO: All right. All right.

MS. JARVIS: Yeah. But it would be then a very discreet number of parties --

JUDGE PRO: Okay.

MS. JARVIS: -- rather than parties we can't identify and don't know. And in fact there's even some confusion between, you know, the time that the objections were filed through the confirmation hearing and today, as to how many and what parties we're dealing with.

In addition, in this case, the debtor. when they dealt with lenders, dealt with them under a certain vesting

name, and what that is, is a name where they invested under. So, for instance --

JUDGE PRO: I don't want to belabor it, but if that were the finding, would the proper remedy be then to allow for a second amended or third amended notice of appeal?

MS. JARVIS: Under the Torres case it's jurisdictional. It's jurisdictional. And if you do not proper comply with it, it's as if you never appealed at all. So the proper remedy would be those that were named, properly named, are appellants; those that were not, are not.

And even -- even taking the more liberal standard, which we don't think applies, it does -- you have to have -- it has to be objectively clear that the party intended to appeal and that they intended it to go forward and that you can -- there are certain fairness concerns with it. And, again, we can't even identify who all these parties are. When I started talking about the vesting names, there's certain names in which these parties invested into USA Commercial Mortgage. They might be, for instance, a pension plan or they might be as an individual or a trust or whatever. And the -- even the -- taking the 2019 statement that was -- that is not sufficient and was not filed with the notice of appeal, these aren't vesting names. We can't even figure out who's on there. And we don't know what interest they're in. Whether they're -- they appear not even to be all Direct

Lenders, and these issues relate solely to Direct Lenders. Some of them appear to be fund members. Solely fund members. But it is insufficient even on a much lesser [sic] standard. And this is -- it is jurisdictional. When that is not properly done, because 8001(a) requires -- for a notice of appeal to be sufficient it has to name the parties that have appealed.

JUDGE JONES: Now that last argument seems to me to be a little bit, again, hyper-technical. If they just simply used the wrong name so that you have some confusion in identifying them consistent with the list of vested owners, that seems to me -- while we might have discretion, it would really be an abuse if discretion if we dismiss an appeal as to a particular party who in fact is listed, but just listed not exactly the same as the vesting name --

MS. JARVIS: Right. And I was arguing that under 3(c) which is the more liberal standard. You know, 8001 is a stricter standard and actually requires the names, and we don't -- we don't have the names. They were not filed with the notice of appeal. And even with respect to the 2019 statement, it's not a sufficient 2019 statement. You know, you can see from the progression of people that are represented that we have no idea, I mean, even how many people are, you know, part of this group. And that's not a sufficient notice of appeal under 8001(a). And that is

jurisdictional.

As I said, the remedy to that would be to strike all those appellants that were not properly named.

Thank you, Your Honors.

JUDGE PRO: Thank you, counsel.

Mr. Smith, were you going to start, or?

MR. SMITH: Yes.

(Pause in the proceedings)

MR. SMITH: Your Honor, first I wanted to make some comments on the emergency nature of the motion. Not much we can do to change that today because we are here, but it seems to me that it really isn't an emergency in the sense that since -- the appeal was filed January 16th. Here we are a month later. It was done on extremely shortened time, extremely shortened briefing schedule. It seems to me this is something that they have known about for -- prior to January 16th as well, and could've been raised immediately. And certainly we'd have been before this Court on a motion to expunge the stay pending appeal.

That issue wasn't raised at that time. So, to a certain extent, I think the emergency was manufactured by the debtors waiting 'till the last minute to bring this up.

I also thought it was important that the representations that there was no interest in Silver Point as another bidder, significant because it's not true. And some

of these statements I agree are without evidentiary support, not on the debtor's side and perhaps not on my side either, but I think the Court should be aware of them.

There's also no evidence that Compass is going to back out on February 16th. We don't really know what's going to happen. So I think to the extent that it is an emergency, it really hasn't been demonstrated by the debtor why it is. And so I only point that out because to -- we've gone sort of beyond just surface issues as to why this appeal may need to be dismissed. We've talked a lot about the merits of the appeal. It's fairly complicated. I don't think it's appropriate that it be dealt with at this emergency --

JUDGE PRO: There's a lot we don't know, Mr. Smith.

MR. SMITH: Right.

JUDGE PRO: Or at least a lot I don't know, to be sure. But the fact remains that the -- what is before us, indicates the sale's to take place on the 16th. It is what it is.

MR. SMITH: Right.

JUDGE PRO: And we don't have evidence that there is some forbearance. We have, as Judge Jones quite aptly pointed out, the very practical wrinkle [sic], and no matter what happens here, a notice of appeal can be filed.

MR. SMITH: Right.

JUDGE PRO: And there's gonna be something pending

for a period of time.

MR. SMITH: Well, and also I just wanted to point out, and I'm not gonna spend a lot of time on that because we are here, we are arguing it, and I'm prepared to go forward.

But in the transcript on December 20th, Compass stated on page 39 that they waived the formality of a confirmation order and they'd be willing to rely on a 363(m) sale, which is consistent with what Judge Jones mentioned.

The part of it that I disagree with Judge Jones is that that forecloses any rights the Direct Lender to argue that their contracts have been modified of a result of the sale to Compass. I mean that's really the primary issue.

I appreciate the fact that there's some right preserved under the surviving Section 3 right that they call it, that under certain circumstances the Direct Lenders can say if there was -- if there was a matured default on the petition date they can raise that, there's time limits, there's a procedure.

Our position all along has been -- and the way this started out in Bankruptcy Court is these contracts are being sold, period. And there is no authority that you can take a contract and in a sale change the contract and bind the other contracting parties to that change. That's really our problem. I mean that's really the basis of our appeal.

You take the servicing agreement, you start

modifying it and say we can raise this issues, you can't raise these issues, you can't raise other default issues, you don't have the right any longer, under Section 8, simply to terminate the servicing agreement, and other aspects that are really under the merits of the appeal. But the basic underlying thrust of it is, you can't change the agreement that's being sold.

JUDGE JONES: And you're contending in your appeal that that's exactly what this order does?

MR. SMITH: Correct. And a lot of the problem occurs --

JUDGE JONES: Be just a little bit more specific. How does it modify the contract?

MR. SMITH: Well, for example, that's one. Section 8 allows Direct Lenders to terminate the contract.

JUDGE JONES: If there's a default.

MR. SMITH: Right. And it's broader than Section 3. There's also other rights that Direct Lender --

JUDGE JONES: But the order says without modifying the contract. So don't you have the right, even under the language of the order, to continue to assert a right of termination for a prior default?

MR. SMITH: I hope that's true.

JUDGE JONES: Mm-hmm.

MR. SMITH: That's not the way I read it. The way I

read it, under paragraph 14 of the order, is that it's free and clear of everything else, except for that surviving right, and that's the problem we have.

And there's other issues that we're concerned about, interpretation of the contract issues that really aren't before the Court today. But I mean, in essence, those are merits of the appeal issues. But, in essence, our position is you can't change anything. Nothing.

I mean, and that's one of the problems you get when you say -- which I think is an argument of convenience because originally you know that the committee for this group of people is called the Executory Contract Committee. Everyone knew it was an executory contract. At some point in time the decision was made, you can't have an executory contract because it can't be assumed and assigned because it can't be cured, so let's not call it an executory contract anymore. All of a sudden the committee's name change, it became the Direct Lender's Committee.

The problem with doing it in that manner, is all the procedural safeguards that's normally available for selling an executory -- for selling an executory contract are gone. You don't have to have the purchaser give adequate assurance of future performance. You don't have to cure.

And then you go a step farther and you say, plus, we're gonna change it. We're gonna put some restrictions on

what can be raised and what can't be raised by the other contracting party. That could never happen when you're assuming and assigning an executory contract. And we're gonna provide procedures for how those matters are addressed in what court and put time limits on it.

I think that was beyond the ability of the Bankruptcy Court to do. And the only reason I bring it up is that you mentioned, Judge Jones, a 363(m) might solve the issue. Maybe in one respect it would, but I didn't want my silence to mean that I agree with you, that all those appealable issues that we have are gone because of 363(m).

So, in any event, Your Honors, and moving along to the merits of what's been raised in this motion. The first issue, and as I read it in the initial motion was that the appellants do not have standing. And what I read, which is set forth in page 14 of the original motion, is that the appellants didn't have standing because they were not aggrieved because they did not adequately protect their interest below in appearing and properly raising and preserving objections for appeal.

That shocked me slightly. Didn't, in fact, understand it. Have read what the appellees, the debtors call these [sic] persons aggrieved as directly and adversely effected pecuniarily by an order of the Bankruptcy Court. That is a very limited definition of persons aggrieved, it's

not the only definition.

I cited the other -- one of the other definitions in the PRTC, Ninth Circuit case, which is a person aggrieved as one whose rights are diminished, property rights are diminished, burdens are increased, or it detrimentally effects their rights.

So I certainly think that the Direct Lenders fall within the definition of persons aggrieved. Certainly if they weren't aggrieved I wouldn't be here. And they're aggrieved because, as was explained by Ms. Jarvis, these payments that occurred post-petition, which have been loosely referred to prepaid interest, but really they're payments by borrowers directed to the Direct Lenders that were diverted by the debtor and held. They're the normal payments on the loans. And so what the debtor said is, well, you improperly received payments pre-petition, so we're gonna take these.

Now if you look at the course of action, how this occurred, first there was a hold back order by Judge Riegle. And the hold back was without prejudice of anyone's rights. Just gonna hold it and later see. And then the initial plan said we're gonna preserve all those rights. The first plan said that, the second plan said that. Finally we get to the third plan and they say, you know what, you give up all segregated funds, and that's a compromise. You didn't negotiate it.

JUDGE JONES: I have some problem with your argument. It's really a side point. It's not the issue in front of us today. It goes to the merits of the appeal.

MR. SMITH: Sure.

JUDGE JONES: But I have some problem --

MR. SMITH: Okay.

JUDGE JONES: -- with your argument. You know, they certainly -- it wasn't -- it wasn't theft. They had the right under the servicing agreements to receive those payments, to collect them in the first instance.

MR. SMITH: Right.

JUDGE JONES: And it's -- and I'm not quite sure you could even call it embezzlement, having properly received it, diverting them. They had improperly paid advanced funds to these lenders.

MR. SMITH: From an unknown source.

JUDGE JONES: From -- let's assume from their own monies.

MR. SMITH: But that's an assumption you --

JUDGE JONES: And why would they not have the right simply to not make the next payment because they already advanced payments that they should not have, out of other people's monies, out of their own monies, one or the other.

MR. SMITH: Well --

JUDGE JONES: So at any rate, I'm having some

difficulty with your argument.

MR. SMITH: Yeah, and that's a good point, Your Honor. And what that really underscores is, why this has to be brought up in an adversary proceeding, and why you don't just get to say in a plan, you know what, we're taking it back. And if --

JUDGE JONES: You certainly have to have an adversary proceeding if the money is in your hot hands --

MR. SMITH: Well --

JUDGE JONES: -- and I want to get it. But if it's in my hands and I've got a right to withhold, I'm not sure why I have to have an adversary proceeding to --

MR. SMITH: Well --

JUDGE JONES: -- declare my right to withhold.

MR. SMITH: -- because, Your Honor, they were only servicers. They've never had a right to keep the money. The money only flowed through them. It belonged --

JUDGE JONES: Nor did they have the right to advance.

MR. SMITH: Well, but see the problem with that is, if -- if you just look --

JUDGE JONES: So speaking about the trust account itself, not qua, the debtor, speaking about the trust account, its liabilities and obligations just in itself.

MR. SMITH: Right.

JUDGE JONES: It got $100 in from somebody else, instead of paying it to somebody else it paid it to you.

MR. SMITH: Right.

JUDGE JONES: And now it gets in the payment that's due you.

MR. SMITH: Okay.

JUDGE JONES: I don't know why in the world it would need an adversary proceeding simply to keep back the $100 that it previously prepaid you unfairly --

MR. SMITH: Well --

JUDGE JONES: -- and withhold it --

MR. SMITH: Well, because it's --

JUDGE JONES: -- to offset it or recoup it.

MR. SMITH: And, again, that's the merits of the appeal issue.

JUDGE JONES: It is.

MR. SMITH: But that's, I believe what the law is under 7001. I mean if you're gonna take somebody's property, you have to bring an adversary proceeding.

JUDGE JONES: I agree with that.

MR. SMITH: And of course the benefit of that is, I get to raise defenses to all the things that you're saying. And remember how this was all keyed up. Now this was keyed up as a plan and it was called a compromise. It was a compromise made by the committee who had no authority to compromise the

rights of the Direct Lenders. And it wasn't signed off by all the Direct Lenders that supposedly might approve the compromise. How can it be a compromise? And the whole thing was kinda massaged together and said, well, you know, it's in the plan, so the people that didn't vote for the compromise are gonna be bound by that provision in the plan. That's not how a plan works. The plan binds the rights --

JUDGE JONES: Well, again, we're on a side issue --

MR. SMITH: Yeah.

JUDGE JONES: -- and I don't want to take too much time.

MR. SMITH: Should I move on?

JUDGE JONES: But here's -- here's a potential alternative way to look at it. The right to receive those payments immediately when they're paid by the lender is a claim, it's a right.

MR. SMITH: Sure.

JUDGE JONES: Potentially it's a post-petition right, but it's a claim. And when you, lender, -- or when you, servicer, default on it, it produces a claim. It's my right either in equity or in damages --

MR. SMITH: Right.

JUDGE JONES: -- to claim your -- to make demand that you immediately forward it to me. And this plan proposed a compromise of that claim.

MR. SMITH: Right.

JUDGE JONES: That is, we're not gonna forward it to you, we're gonna withhold it to recoup from prior prepayments of interest.

MR. SMITH: Right.

JUDGE JONES: And, by gum, 1123 and 1144 say, if a majority in number, and, what, two-thirds in number of claims vote yes, that can be crammed down on anybody who votes no.

MR. SMITH: And generally I agree with that because what you're really cramming down is the treatment of creditors. But if you're saying we're gonna take property back from a group of 3,000 people or however many in there, we're gonna take it back. All right? And it's gonna be determined by the plan. And if one or two people vote and they're the only people that vote in that class, you all gotta give your property back. That's the problem I have.

And the other -- the other part of it, Your Honor, is that -- I appreciate your comments, I've faced them in Bankruptcy Court. You know, Judge Riegle said, do you want all your clients sued? No. But I think they're entitled to those procedural safeguards. I mean I cited a case, and I can't recall right now, where exactly the same situation occurred.

JUDGE JONES: But how do you contradict my potential analysis that -- that two-thirds in number and a

majority in amount, have the right to dictate the treatment of their claim, a claim -- a right to receive the payments immediately --

MR. SMITH: Right.

JUDGE JONES: -- as to the entire class?

MR. SMITH: Well, but it's not -- it's not really their right to receive the pay -- well, okay. I mean that's not --

JUDGE JONES: So your only counter argument is --

MR. SMITH: The claim is --

JUDGE JONES: -- it's not a claim in the definition of the language of the statute.

MR. SMITH: Well, it's post-petition withholding of money. And I think if you're gonna call it a compromise, you can't play games with that word. What does a compromise mean? We both agree, we bring it before the Court on 9019.

JUDGE JONES: All right.

MR. SMITH: And that's how it works.

JUDGE JONES: It goes to the merits and all events.

MR. SMITH: Yeah. I appreciate that. But it's an interesting argument.

The -- back to the aggrieved party. And as I first read the motion filed by the debtors that these issues had not been raised by the lower court, I looked at it this way. The comment that we didn't raise factual arguments, really because

there were no factual issues in dispute with respect to the objections that were being raised by the Lender Protection Group. No necessity to raise or to raise factual arguments because that was not the issue. The issue was legal issues, can they take the segregated funds? Can they sell the contracts and modify them? They were all legal issues that did not involve material factual disputes. And I haven't seen anything in the briefing filed by the debtor of something that it should've raised at that level. In fact, I'm not aware of anything.

So we certainly satisfied the requirement, I think it was in the Commercial Mortgage case which said that a prerequisite to the appeal is that you file an appropriate objection and you appear and argue, and that's exactly what I did. And so I don't think that the factual evidence argument is significant. I think within that -- that objection that were --

JUDGE JONES: Now I hear that argument. That's -- it's frankly a very persuasive argument to me. But one area that I'm not quite sure about is, they say that all of these legal issues, you declare to be legal issues, are predicated upon your having an interest in the commingled funds.

MR. SMITH: Right.

JUDGE JONES: And you just simply did not contest that issue at all. That is, they were commingled, it was an

insolvent fund. You have no tracing right, therefore, you have no interest. And whether you were raising a purely legal issue or not, you have no interest.

MR. SMITH: Yeah, and I've read that several times and I have -- I'm baffled by that.

Now clearly pre-petition, the account was commingled. And I'm not -- I mean the issue is that some of the Direct Lenders had diverted principal. They don't know who diverted it, but I don't think it's necessary to solve that commingling issue in order to raise that argument, and I don't think that's what's being argued by the -- by the debtor.

Post-petition, paying -- making the payments that should go to the Direct Lender, called the segregated funds, are not commingled. The representations are every penny is accounted for. That's the money that's of concern that's being taken by the debtor from the Direct Lenders.

So the commingling argument, I didn't -- I didn't track on how that raises -- that creates a problem for the debtor. And if Your Honor can -- has more questions on that, let me know, but I -- that's the way I read it. So I didn't see that that foreclosed any argument that we raised.

What I saw last night, and actually I didn't see it 'till 4:00 in the morning because I wasn't sure when the brief was filed. But the reply brief, in my mind, raised some new

issues, which, again, I feel slightly prejudice by because I haven't had a chance to respond in writing.

But as I read the reply brief is that -- that the issue of do we know whether any of the peoples in -- any people in The Lender Protection Group are actually people that have diverted principal or prepaid interest issues. At least that's the way I read it.

JUDGE PRO: First we have to know who the persons in The Lender --

MR. SMITH: Right.

JUDGE PRO: -- Protection Group are. Part of the argument is that this is simply not clear and --

MR. SMITH: Sure.

JUDGE PRO: -- that there's a failure to comply with the requirements of 8001.

MR. SMITH: Yeah. And interestingly along that line, Your Honor, is that at the Bankruptcy Court level there was arguments that Mr. Milanowski did not have standing to raise the arguments that he raised. And you, of course this Court addressed those I guess last week.

Those arguments were not raised at the Bankruptcy Court level. There was never an objection raised that The Lender Protection Group does not have standing because they're not aggrieved people. They aren't people with diverted principal. They aren't people with prepaid I

interest. They aren't people who are parties to these servicing agreements.

So the first problem I have is, I don't think it belongs here for the first time on appeal because it wasn't raised in the lower court. The reason it wasn't raised in the lower court is because we filed 2019 statements listing the name and address of each and every member of the LPG Group, and we amended it as additional members were included.

The timing of that amendment, I mean I don't see the significance. It occurred sometime during the confirmation hearings during the course of my oral argument in which I argued the very objections that were raised in the pleading. To say that some of that group was excluded because it wasn't raised earlier I think is incorrect. It was raised by the time the arguments were made, the entire group should be included.

So they had the names and addresses of all the people, but they didn't raise at the Bankruptcy Court level that this isn't enough. And the reason they didn't raise it wasn't enough is because they had detailed information on these people. There are schedules and statements filed, prepared by the Mesereau Group, detailed after extensive investigation. I think they're found at Docket 784, which is a list of all the unsecured creditors, including people in our group. And second -- and Docket number 682, I believe, which

includes a list of the people who had prepaid interest.

So clearly, and also clearly, all of our group, they're all Direct Lenders, they all have issues with the servicing contracts. The reason why the debtor didn't raise this at the Bankruptcy Court level was because it wasn't an issue. They knew that our people were aggrieved. The disclosure statement itself says there are people aggrieved with this situation. They are Direct Lenders. I just represented about 350 of them.

And so this is, as I see it, an agreement -- or a new issue raised 9:00 p.m. last night in the reply brief that I didn't get to properly respond to, but it's not a real issue. We are aggrieved persons. Even in the oral arguments before Judge Riegle, we had discussions about what people I represented. I represented that I had people that had prepaid interest issues. So these are not a surprise. It was brought up at the Bankruptcy Court level and not objected to, and it does not belong here at this time for the first time on appeal.

Now the final issue as to the -- whether the notice of appeal was proper. And we were very careful about this and read the rules carefully. Rule 8001(a)(2) says:

"It shall contain the names of all parties to the judgment, order, or decree appealed from, and the name, address, and telephone number of their respective

attorney."

All of the pleadings in the Bankruptcy Court said LPG. That is the name that's on the pleadings. I think we named the party to the judgment, which is LPG.

Now out of caution we specifically incorporated in the notice of appeal the 2019 statement filed in the Bankruptcy Court. I think -- as I go through here, I think that that is sufficient for notice of appeal purposes under Rule 8001. Clearly the appellees knew who we were and never objected previously that they didn't know who the members of the LPG Group [sic].

Now you mention some cases, Your Honor. There were some cases referred to. I don't think in any way the three main cases referenced in the pleading support the debtor's argument that the appeal is faulty, the notice of appeal is faulty.

The Torres case is really a Rule 3(c) case, FRAP 3(c). And really what that was was a class action, Your Honor. Judge Jones asked about what happened in that case, it was a class action. Not all the class members were identified, an appeal was filed and it named a couple people and said, et al. And then the appeal was taken by some person that was never named in any of the matters at the trial court level. And of course the U.S. Supreme Court said that's not good because you haven't even ever named that person. That is

not what occurred here.

The Torres court went on to reference Rule 3(c), which states at 3(c)(1)(A), that the notice must specify the party or parties taking appeal by naming each one in the caption or body of the notice. But the attorney representing more than one party may describe these with such terms as all plaintiffs, the defendants, the plaintiff's ABC, et al., or defendant's except X. That term "such as" is not -- doesn't say exclusively only in this manner, it's meant to give some examples. And I think by saying LPG, we're clearly identifying the group of people.

JUDGE JONES: Does 8001(c) give that same latitude?

MR. SMITH: No. But to go on, Your Honor, 8000(c) just says the parties to the judgment, which is why the LPG was named. 3(c) -- FRAP 3(c) is slightly different. I think that's exactly what we did.

But I just wanted to point out that the Torres court, U.S. Supreme Court said:

"The specificity requirement of Rule 3(c) is met by some designation that gives fair notice of the specific individual or identity seeking to appeal." That's found on page 318.

I think this was clearly fair notice to these people who had dealt with the Lender's Protection Group for months.